

Double Jeopardy: Rethinking the Parameters of the Multiplicity Prohibition

BRIAN L. SUMMERS

I. INTRODUCTION

The Double Jeopardy Clause of the Fifth Amendment provides: “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.”¹ This guarantee is considered to be fundamental to the American scheme of justice and is applicable to the states through the Fourteenth Amendment’s Due Process Clause.² The protection against double jeopardy was well established in the common law of England before being adopted in American jurisprudence as part of the common law and the United States Constitution.³

The simplicity of the language of the Double Jeopardy Clause belies the difficulty of its application. Indeed, the United States Supreme Court’s double jeopardy jurisprudence has lacked congruity and clarity, thereby once inspiring the Court to observe that “the decisional law in the area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator.”⁴

The confusion stems at least in part from the Supreme Court’s interpretation of the Clause as barring not just multiple prosecutions for the same offense, but also the imposition of multiple punishments for the same offense.⁵ This latter protection, the so-called multiple-punishments component, has been the basis for two recent Supreme Court cases that have combined to extend the reach of the Double Jeopardy Clause.⁶ The prohibition against multiple punishments usually arises in the context of parallel criminal and civil proceedings instituted against a defendant for the same course of conduct.⁷ The

¹ U.S. CONST. amend. V.

² *Benton v. Maryland*, 395 U.S. 784 (1969) (overruling *Palko v. Connecticut*, 302 U.S. 319 (1937)).

³ WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 24.1(a) (1984).

⁴ *Albernaz v. United States*, 450 U.S. 333, 343 (1981). The Sargasso Sea is a region in the North Atlantic Ocean, northeast of the West Indies, that is known for its abundance of sargassum. Sargassum is a type of floating, brown seaweed. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2015 (Philip B. Gove ed., 1986).

⁵ See discussion *infra* part III.

⁶ See discussion *infra* parts II.B–C, V.

⁷ For a discussion of this double jeopardy concept, see Linda S. Eads, *Separating Crime From Punishment: The Constitutional Implications of* *United States v. Halper*, 68 WASH. U. L.Q. 929 (1990); Nelson T. Abbott, Note, *United States v. Halper: Making Double Jeopardy Available in Civil Actions*, 6 B.Y.U. J. PUB. L. 551 (1992); Lauren O. Clapp, Note, *United States v. Halper: Remedial Justice and Double Jeopardy*, 68 N.C. L.

applicability of the Double Jeopardy Clause, however, to situations involving a criminal prosecution and a prior or subsequent civil suit is of doubtful validity.⁸

This Note addresses whether the Fifth Amendment's Double Jeopardy Clause really embodies a bar against the imposition of multiple punishments for the same offense. Part II reviews the Supreme Court's double jeopardy jurisprudence in parallel criminal and civil cases. Part III addresses the scope of double jeopardy protection adopted by the Supreme Court in its decisional law dealing with the Clause. Part IV of this Note presents the argument against recognizing the existence of a multiple-punishments component within the double jeopardy guarantee. Part V then examines the Court's misguided use of the multiple-punishments concept in two noncriminal cases. Finally, Part VI concludes with a summary of the proper constitutional role the Double Jeopardy Clause should play in the context of parallel criminal and civil proceedings.

II. THE SUPREME COURT'S DOUBLE JEOPARDY JURISPRUDENCE IN CASES INVOLVING PARALLEL PROCEEDINGS

A. *The Statutory Construction Cases*

For more than fifty years, the Supreme Court constructed a double jeopardy jurisprudence that steadfastly refused to hold a sanction sought in a civil proceeding as being violative of the Double Jeopardy Clause.⁹ Beginning

REV. 979 (1990); Andrew Z. Glickman, Note, *Civil Sanctions and the Double Jeopardy Clause: Applying the Multiple Punishment Doctrine to Parallel Proceedings After United States v. Halper*, 76 VA. L. REV. 1251 (1990); Lynn C. Hall, Note, *Crossing the Line Between Rough Remedial Justice and Prohibited Punishment: Civil Penalty Violates the Double Jeopardy Clause—United States v. Halper*, 65 WASH. L. REV. 437 (1990); Elizabeth S. Jahncke, Note, *United States v. Halper, Punitive Civil Fines, and the Double Jeopardy and Excessive Fines Clauses*, 66 N.Y.U. L. REV. 112 (1991).

⁸ See discussion *infra* part IV.

⁹ It is worth noting that there were several nineteenth century cases in which the Supreme Court suggested that the imposition of a civil penalty subsequent to a criminal action might be punishment within the scope of the Double Jeopardy Clause. See, e.g., *Coffey v. United States*, 116 U.S. 436 (1886) (holding that an in rem forfeiture action brought against distilling equipment was barred by the owner's prior acquittal on related criminal charges), *overruled by* *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984) (holding that "neither collateral estoppel nor double jeopardy bars a civil, remedial forfeiture proceeding initiated following an acquittal on related criminal charges"); *United States v. Ulrici*, 111 U.S. 38 (1884) (barring action to recover a monetary tax penalty from a distiller because of the prior court-sanctioned seizure and sale of the spirits

in 1938, the Court articulated a statutory construction test that was followed consistently until 1989.¹⁰

In *Helvering v. Mitchell*,¹¹ the Court addressed the issue of whether the Double Jeopardy Clause should bar a civil action brought by the government following a criminal proceeding based on the same facts. The Court held that the "question is one of statutory construction."¹² If the sanction was provided for by a statute that was civil in nature, then double jeopardy protection did not extend to the civil proceeding.¹³ The *Mitchell* statutory construction test became the standard for the Court's analysis of subsequent cases involving the application of double jeopardy protection to civil proceedings.

In *Mitchell*, the defendant was acquitted in a criminal trial of charges of tax evasion stemming from a determination by the Commissioner of Internal Revenue that the defendant had fraudulently declared certain tax deductions on his 1929 income tax return.¹⁴ Subsequently, the government brought a civil action against Mitchell to collect the amount of the alleged tax deficiency plus an additional fifty-percent statutory penalty for fraud.¹⁵ Mitchell contended that the Double Jeopardy Clause barred the civil action because the fifty-percent penalty was intended as punishment, thereby transforming the tax assessment

for the fraudulent acts of the distiller); *United States v. Chouteau*, 102 U.S. 603 (1880) (prohibiting the government from proceeding with a penalty action against the defendant because the compromise reached in a prior criminal action functioned as a complete defense against further recovery under the principle of double jeopardy).

Moreover, in *United States v. LaFranca*, 282 U.S. 568 (1931), the Court suggested that a civil penalty may be characterized as punishment for purposes of double jeopardy analysis. Although the Court stopped short of announcing a constitutional holding, its dicta in *LaFranca* expressed the view that punishment "is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution." *LaFranca*, 282 U.S. at 573 (quotation omitted).

¹⁰ The Court's decision in *Helvering v. Mitchell*, 303 U.S. 391 (1938), signaled a reversal in the trend of applying double jeopardy protection to civil penalty proceedings. Indeed, several scholars have observed that the line of reasoning displayed in the cases cited *supra* note 9 was rejected by subsequent Supreme Court decisions. See, e.g., J. Morris Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 393 n.45 (1976); Michael H. Levin, *OSHA and the Sixth Amendment: When Is a "Civil" Penalty Criminal in Effect?*, 5 HASTINGS CONST. L.Q. 1013, 1034-39 (1978).

¹¹ 303 U.S. 391 (1938).

¹² *Id.* at 399.

¹³ *Id.* at 404.

¹⁴ *Id.* at 395-96.

¹⁵ *Id.* at 395. The civil action was brought pursuant to the Revenue Act of 1928, ch. 852, § 293, 45 Stat. 791, 858 (1928).

action into a second criminal proceeding based on a single course of conduct.¹⁶

The Supreme Court disagreed, however, and upheld the government's right to recover the tax deficiency and accompanying penalty. The issue to the Court was simply whether the statute imposed a criminal or civil sanction.¹⁷ By applying canons of statutory construction,¹⁸ the Court concluded that Congress intended the statute to impose a civil penalty and that the fifty-percent sanction was in fact remedial because it reimbursed the government for investigatory and other costs of the taxpayer's fraud.¹⁹

Shortly after the *Mitchell* decision, the Court reaffirmed its statutory construction analysis of double jeopardy claims in the context of parallel criminal and civil proceedings. In *United States ex rel. Marcus v. Hess*,²⁰ the defendants were electrical contractors who were indicted for defrauding the government by collusively bidding on public projects²¹ and were fined after pleading *nolo contendere*.²² Subsequently, a private plaintiff brought a *qui tam* action²³ in the name of the United States under the civil False Claims Act.²⁴ This action resulted in a judgment against the defendants for \$315,000, of which \$203,000 represented double damages and the remainder reflected a civil penalty of \$2,000 for each of fifty-six violations.²⁵

The defendants challenged the judgment on double jeopardy grounds, arguing that the *qui tam* action was barred as a second attempt to punish the defendants for the same offense. The *Hess* Court adhered to *Mitchell*'s statutory construction approach²⁶ in concluding that the statute at issue was remedial

¹⁶ *Id.* at 398. The alleged deficiency in *Mitchell*'s tax return was \$728,709.84, thereby resulting in a fifty-percent penalty totaling \$364,354.92.

¹⁷ *Id.* at 399. The Court explained that the "question for decision is thus whether § 293(b) imposes a criminal sanction." *Id.*

¹⁸ *See id.* at 404-05.

¹⁹ *Id.* at 401, 405.

²⁰ 317 U.S. 537 (1943).

²¹ The "contracts were made with local governmental units rather than with the United States government, but a substantial portion of" the funding for the Public Works Administration projects came from the federal government. *Id.* at 539.

²² The criminal fine imposed was \$54,000. *Id.* at 545.

²³ A *qui tam* action "is an action brought by an informer, under a statute which establishes a penalty for the commission or omission of a certain act, and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution." BLACK'S LAW DICTIONARY 1251 (6th ed. 1990). Thus, the private plaintiff in *Hess* was suing on behalf of the United States, as well as for himself.

²⁴ 31 U.S.C. §§ 231-234 (1934) (current version at 31 U.S.C. § 3730 (1988)).

²⁵ *Hess*, 317 U.S. at 540.

²⁶ *See id.* at 549. The Court noted:

and, therefore, civil in nature. The Court acknowledged that the double damages provision or the fixed civil penalty of \$2,000 per violation might exceed the amount of fraud perpetrated on the government in any given case.²⁷ The Court specifically noted, however, that the civil remedy under the False Claims Act "does not lose the quality of a civil action because more than the precise amount of so-called actual damage is recovered."²⁸ Unlike the punitive purposes behind the criminal false claims statute, "the chief purpose of the [civil False Claims Act] was to provide for restitution to the government of money taken from it by fraud."²⁹ The Court concluded that there was no merit to the defendants' contention that the civil penalty was in fact "criminal."³⁰ Thus, the Double Jeopardy Clause did not bar the civil action despite the fact that it was based on the same conduct that was at issue in the criminal prosecution.³¹

The next consideration of the applicability of the Double Jeopardy Clause to a civil proceeding came in *Rex Trailer Co. v. United States*.³² The defendant in *Rex Trailer* was convicted under the Surplus Property Act³³ for defrauding the United States during the purchase of five trucks.³⁴ After the company pleaded nolo contendere to criminal charges and paid fines totaling \$25,000,³⁵ the government brought a civil action against the defendant under the same act and sought \$2,000 in penalties for each violation.³⁶

The defendant challenged the civil penalty action on double jeopardy

We may start therefore with the language of the *Mitchell* case: "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for decision is thus whether . . . [the statute in question] . . . imposes a criminal sanction. That question is one of statutory construction."

Id. (alteration in original) (quoting *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938)).

²⁷ See *Hess*, 317 U.S. at 550-52.

²⁸ *Id.* at 550.

²⁹ *Id.* at 551.

³⁰ *Id.* ("It is true that '[p]unishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrong-doer is concerned,' but this is not enough to label it as a criminal statute.") (quoting *Brady v. Daly*, 175 U.S. 148, 157 (1899)).

³¹ *Id.*

³² 350 U.S. 148 (1956).

³³ Surplus Property Act of 1944, 58 Stat. 765 (1944) (repealed 1949).

³⁴ *Rex Trailer*, 350 U.S. at 150.

³⁵ *Id.* at 149.

³⁶ *Id.* at 150.

grounds. Again, the Supreme Court turned to the *Mitchell* statutory construction analysis in determining that the relevant question was whether the statute was civil or penal.³⁷ The Court determined that the statutory penalty was "comparable to the recovery under liquidated-damage provisions which fix compensation for anticipated loss."³⁸ Although recognizing that the specific damages resulting from the injury to the government³⁹ could be difficult if not impossible to ascertain, the Court stated that "it is the function of liquidated damages to provide a measure of recovery in such circumstances."⁴⁰ The Court found, therefore, that the recovery in this case was civil in nature.⁴¹

The Supreme Court's double jeopardy jurisprudence in the context of parallel proceedings continued to develop in two forfeiture cases. In *One Lot Emerald Cut Stones v. United States*,⁴² the defendant was indicted and acquitted on federal smuggling charges;⁴³ in *United States v. One Assortment of 89 Firearms*,⁴⁴ the defendant was indicted and acquitted of violating the Gun Control Act⁴⁵ by "knowingly engag[ing] in the business of dealing in firearms without a license."⁴⁶ Following the criminal acquittal in each case, the government instituted a forfeiture action against the goods involved, while each defendant sought to bar the forfeiture proceeding on double jeopardy grounds. In both *One Lot Emerald Cut Stones* and *One Assortment of 89 Firearms*, the Court held that acquittal on criminal charges did not preclude the subsequent in rem forfeiture proceeding because Congress intended the forfeitures to be civil and remedial, rather than criminal and punitive.⁴⁷ In doing so, the Court adhered to *Mitchell* and approached the resolution of the question as a matter of statutory construction. These cases clarified the Court's view that unless a forfeiture sanction is intended as punishment, so that the proceeding itself is

³⁷ *Id.* ("The only question for our decision, then, is whether § 26(b)(1) is civil or penal . . .").

³⁸ *Id.* at 153.

³⁹ According to the Court, the injuries suffered by the government included the preclusion of bona fide sales to veterans under the Surplus Property Act, the decrease in the number of motor vehicles available to governmental agencies, and the promotion of undesirable speculation. *Id.*

⁴⁰ *Id.* at 153-54.

⁴¹ *Id.* at 151, 154.

⁴² 409 U.S. 232 (1972) (per curiam).

⁴³ The criminal statute under which the defendant was indicted is codified at 18 U.S.C. § 545 (1988).

⁴⁴ 465 U.S. 354 (1984).

⁴⁵ 18 U.S.C. § 922 (1988).

⁴⁶ *One Assortment of 89 Firearms*, 465 U.S. at 355.

⁴⁷ *One Lot Emerald Cut Stones*, 409 U.S. at 237; *One Assortment of 89 Firearms*, 465 U.S. at 366.

essentially criminal in nature, the Double Jeopardy Clause does not bar a civil forfeiture action instituted after a trial on related criminal charges.

In summary, the Supreme Court's decisions from *Mitchell* to *One Assortment of 89 Firearms* culminated in the construction of a double jeopardy analysis to be applied to parallel criminal and civil proceedings. Two principles were clearly derived from *Mitchell* and its progeny.⁴⁸ First, a statutory construction test would govern the applicability of double jeopardy protection to a civil action instituted by the government following a criminal trial based on the same facts. If the statute providing for the sanctions was construed as civil in nature, then the Double Jeopardy Clause would not bar the subsequent proceeding. Second, only criminal punishment could trigger the protection of the Double Jeopardy Clause. Under the *Mitchell* mode of analysis, a civil penalty was not punishment for double jeopardy purposes. Double jeopardy only applied when the punishment at issue resulted from an indictment under a criminal statute, which then went to trial in a criminal proceeding.

B. *United States v. Halper*

In *United States v. Halper*,⁴⁹ the defendant defrauded the government by submitting false reimbursement claims for Medicare services.⁵⁰ On sixty-five separate occasions, Halper had requested reimbursement of twelve dollars per claim when the actual service rendered entitled his laboratory to only three dollars per claim, thereby resulting in \$585 in overcharges being assessed to the federal government.⁵¹ Halper was convicted on sixty-five counts of violating the criminal false-claims statute,⁵² and as a result, he was sentenced to two years of imprisonment and ordered to pay a fine of \$5,000.⁵³

The government then brought a civil action against Halper under the provisions of the Civil False Claims Act.⁵⁴ The sanction sought in the civil

⁴⁸ See Eads, *supra* note 7, at 944.

⁴⁹ 490 U.S. 435 (1989).

⁵⁰ *Id.* at 437.

⁵¹ *Id.*

⁵² *Id.* The criminal statute under which Halper was convicted was codified at 18 U.S.C. § 287 (1982), amended by False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 7, 100 Stat. 3153, 3169 (1986). The provision at issue in *Halper* prohibited "mak[ing] or present[ing] . . . any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent." *Halper*, 490 U.S. at 437 (alteration in original) (citing 18 U.S.C. § 287 (1982)).

⁵³ *Halper*, 490 U.S. at 437. The pre-1986 statute authorized a maximum criminal fine of \$10,000 for an individual. 18 U.S.C. § 287 (1982).

⁵⁴ *Halper*, 490 U.S. at 438. The civil action against Halper was brought pursuant to 31 U.S.C. §§ 3729-3731 (1982). The False Claims Act, 31 U.S.C. §§ 3729-3731, was

proceeding was a \$2,000 penalty for each false claim. In Halper's case, this civil remedy would have resulted in a fine of \$130,000, or more than 220 times the amount of Halper's \$585 fraud.⁵⁵

The Supreme Court unanimously agreed with the district court⁵⁶ that the imposition of the civil fine on Halper violated the Double Jeopardy Clause. Although the Court claimed to "cast no shadow on the[] time-honored judgments"⁵⁷ utilizing the statutory construction approach,⁵⁸ it held that such an approach "is not well suited to the context of the 'humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments."⁵⁹ According to the *Halper* Court, whether a sanction is labeled as civil or criminal is not dispositive on the issue of whether there has been a double jeopardy violation.⁶⁰ The purpose and effect of the sanction must, therefore, be evaluated, rather than the underlying nature of the proceeding giving rise to the sanction.⁶¹

Justice Blackmun's opinion for the Court attempted to distinguish *Mitchell*, *Hess*, and *Rex Trailer* as not foreclosing "the possibility that in a particular case a civil penalty authorized by the [False Claims] Act may be so extreme and so divorced from the Government's damages and expenses as to constitute punishment."⁶² When a court finds that a civil penalty sought by the government after a criminal conviction appears to "bear no rational relation to the goal of compensating the Government for its loss . . . the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment."⁶³ To the extent that a civil penalty exceeds reasonable compensation for the governmental losses, the penalty is an unconstitutional second punishment in violation of the

amended by the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (1986).

⁵⁵ *Halper*, 490 U.S. at 439. The more precise fraud-to-fine ratio was \$1.00 to \$222.22.

⁵⁶ See *United States v. Halper*, 660 F. Supp. 531, *amended*, 664 F. Supp. 852 (S.D.N.Y. 1987), *vacated*, 490 U.S. 435 (1989).

⁵⁷ *Halper*, 490 U.S. at 449.

⁵⁸ See *supra* part II.A.

⁵⁹ *Halper*, 490 U.S. at 447 (citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 554 (1943) (Frankfurter, J., concurring)).

⁶⁰ *Halper*, 490 U.S. at 447. ("In making this assessment, the labels 'criminal' and 'civil' are not of paramount importance.").

⁶¹ *Id.* at 448. ("[T]he determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve.").

⁶² *Id.* at 442.

⁶³ *Id.* at 449-50.

double jeopardy protection against multiple punishments.⁶⁴

Thus, the Court in *Halper* found that a civil sanction could constitute punishment for double jeopardy purposes when the sanction as applied in an individual case serves the retributive and deterrent goals of punishment. In response, the Court for the first time applied the idea of a double jeopardy protection against multiple punishments to parallel criminal and civil proceedings.

C. Department of Revenue v. Kurth Ranch

This expansive view of the double jeopardy guarantee continued in the recently decided case of *Department of Revenue v. Kurth Ranch*.⁶⁵ In *Kurth Ranch*, Montana law enforcement officers raided the farm of the extended Kurth family.⁶⁶ A large number of marijuana plants and other drug paraphernalia were seized, and six members of the Kurth family were arrested.⁶⁷ After the Kurths pleaded guilty to drug charges, the State instituted a separate proceeding to collect a state tax on the possession and storage of dangerous drugs.⁶⁸ In bankruptcy proceedings instituted by the Kurths, the family challenged the tax's constitutionality. The Bankruptcy Court held that the tax assessment constituted a form of double jeopardy,⁶⁹ and the district court⁷⁰ and the Court of Appeals for the Ninth Circuit⁷¹ affirmed.

The Supreme Court viewed *Kurth Ranch* as presenting the question of whether a tax on the possession of illegal drugs assessed after the imposition of a criminal penalty for the same conduct may violate the double jeopardy protection against successive punishments for the same offense.⁷² The Court began its decision by holding that tax statutes serve a different purpose than

⁶⁴ But see discussion *infra* part IV.A-C.

⁶⁵ 114 S. Ct. 1937 (1994).

⁶⁶ *Id.* at 1942.

⁶⁷ *Id.*

⁶⁸ *Id.* The State attempted to collect the tax under the newly enacted Dangerous Drug Tax Act, MONT. CODE ANN. §§ 15-25-101 to -123 (1987). The 1987 version of the Act was in effect at the time of the Kurths' arrest; some sections of the Act have since been amended. *Kurth Ranch*, 114 S. Ct. at 1941 n.2.

⁶⁹ *In re Kurth Ranch*, 145 B.R. 61, 72-76, (Bankr. D. Mont. 1990), *aff'd*, CV-90-084-GF, 1991 WL 365065 (D. Mont. Apr. 23, 1991), *aff'd*, 986 F.2d 1308 (9th Cir. 1993), *aff'd*, 114 S. Ct. 1937 (1994).

⁷⁰ *In re Kurth Ranch*, CV-90-084-GF, 1991 WL 365065, at *4 (D. Mont. Apr. 23, 1991), *aff'd*, 986 F.2d 1308 (9th Cir. 1993), *aff'd*, 114 S. Ct. 1937 (1994).

⁷¹ *In re Kurth Ranch*, 986 F.2d 1308, 1312 (9th Cir. 1993), *aff'd*, 114 S. Ct. 1937 (1994).

⁷² *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937, 1941 (1994).

civil penalties, thereby making it inappropriate to subject Montana's drug tax to the *Halper* method for determining when a civil sanction is "punishment" for double jeopardy purposes.⁷³ Notwithstanding the inapplicability of *Halper*, five Justices nonetheless agreed that the drug tax was not the type of remedial sanction that could follow the criminal punishment previously imposed.⁷⁴ The determinative factors that supported the characterization of the drug tax as punishment included the high rate of taxation,⁷⁵ the tax's deterrent purpose,⁷⁶ the conditioning of the tax on the commission of a crime,⁷⁷ and the fact that the tax was levied on goods that the taxpayer no longer owned or possessed.⁷⁸ In the Court's words, the "drug tax is a concoction of anomalies, too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis."⁷⁹ Thus, the *Kurth Ranch* Court found the imposition of the tax to be an unconstitutional second punishment.⁸⁰

The decisions in *Halper* and *Kurth Ranch* represent a significant departure from the Supreme Court's prior double jeopardy jurisprudence in the area of parallel proceedings. As such, they serve to renew interest in the debate surrounding the proper scope of double jeopardy protection.

⁷³ See *id.* at 1946-48.

⁷⁴ *Id.* at 1948.

⁷⁵ See *id.* at 1946. Pursuant to Montana law, the Department of Revenue taxed the marijuana at \$100 per ounce for a total tax of \$181,000 based on the 1,811 ounces of marijuana recovered from the Kurth Ranch. The market value of the 1,811 ounces was estimated at \$46,000. The state was, therefore, taxing the drug cache at approximately 400% of its market value. *Id.* at n.17.

⁷⁶ See *id.* at 1946 n.18

⁷⁷ See *id.* at 1947. The Court observed:

In this case, the tax assessment not only hinges on the commission of a crime, it also is exacted only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation in the first place. Persons who have been arrested for possessing marijuana constitute the entire class of taxpayers subject to the Montana tax.

Id. (footnote omitted).

⁷⁸ See *id.* at 1948.

⁷⁹ *Id.*

⁸⁰ For recent commentary on the *Kurth Ranch* decision, see *The Supreme Court, 1993 Term—Leading Cases*, 108 HARV. L. REV. 139, 171-81 (1994); John R. Armstrong II, Case Note, *The Tax Man Cometh, but Fear Not: The Double Jeopardy Clause Bars Criminal Taxation of Drugs Contingent Upon Criminal Conduct*; Department of Revenue of Montana v. Kurth Ranch, 28 CREIGHTON L. REV. 475 (1995); Tad Ravazzini, Summary, Department of Revenue of Montana v. Kurth Ranch: *The Expansion of Double Jeopardy Jurisprudence into Civil Tax Proceedings*, 25 GOLDEN GATE U. L. REV. 331 (1995).

III. THE SCOPE OF DOUBLE JEOPARDY PROTECTION

The Fifth Amendment's proscription of double jeopardy is phrased to prevent any person from being "subject for the same offence to be twice put in jeopardy of life or limb."⁸¹ Read literally, double jeopardy protection would seem to be applicable only to criminal prosecutions in which the defendant was at risk of suffering capital or corporal punishment.⁸² The guarantee, however, has been given a distinctly broader construction by the Supreme Court. Notwithstanding the actual constitutional language, the Court long ago concluded that the Double Jeopardy Clause applies to all criminal offenses without regard to the particular form of punishment imposed.⁸³ Moreover, in *Halper*, the Court extended the reach of double jeopardy protection even further by holding that a government may not escape the dictates of the Fifth Amendment merely by classifying a proceeding as civil in nature.⁸⁴ A sanction imposed in what is nominally a civil proceeding may constitute criminal punishment if it appears to be advancing the punitive goals of retribution and deterrence.⁸⁵

The Supreme Court has traditionally viewed the Double Jeopardy Clause as affording protection to three analytically distinct components. According to the Court, the three separate constitutional protections are as follows: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense.⁸⁶

There is no controversy surrounding the application of the Double

⁸¹ U.S. CONST. amend. V.

⁸² *LAFAYE & ISRAEL*, *supra* note 3, § 24.1(b); *see also Ex parte Lange*, 85 U.S. (18 Wall.) 163, 173 (1873) (noting that the concept of double jeopardy developed at common law when almost every offense was punishable by death or other type of corporal punishment).

⁸³ *See Lange*, 85 U.S. (18 Wall.) at 173 (holding that the Double Jeopardy Clause applies to felonies and misdemeanors alike); JAY A. SIGLER, *DOUBLE JEOPARDY* 39 (1969).

⁸⁴ *United States v. Halper*, 490 U.S. 435, 447 (1989); *see discussion supra* part II.B.

⁸⁵ *See supra* notes 49-64 and accompanying text.

⁸⁶ *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (footnotes omitted), *overruled on other grounds by* *Alabama v. Smith*, 490 U.S. 794 (1989); *see also* *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937, 1941 n.1 (1994); *United States v. Halper*, 490 U.S. 435, 440 (1989); *Ohio v. Johnson*, 467 U.S. 493, 497-98 (1984); *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980); *Brown v. Ohio*, 432 U.S. 161, 165 (1977); *United States v. Wilson*, 420 U.S. 332, 343 (1975); Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 265-66 (1965) (expressing the three-pronged view of the double jeopardy guarantee that was ultimately endorsed by the Court in *Pearce*).

Jeopardy Clause to those two categories addressing multiple criminal prosecutions for the same offense.⁸⁷ What is not so clear, however, is whether double jeopardy protection was ever meant to apply to multiple punishments for the same offense. As discussed in Part II,⁸⁸ this usually arises in the context of a defendant facing some type of sanction (e.g., a fine or a forfeiture) in a civil proceeding following a conviction in a criminal trial. Of course, the same issue is presented if the criminal prosecution follows the civil proceeding.⁸⁹

The Supreme Court's first opportunity to construe the scope of the Double Jeopardy Clause's protections in the context of parallel criminal and civil proceedings came in *Mitchell*. In deciding the case, the *Mitchell* Court stated:

Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for decision is thus whether [the statute at issue] imposes a criminal sanction.⁹⁰

This passage has been cited frequently⁹¹ and appears to recognize the existence of double jeopardy protection against multiple punishments ("merely punishing twice") and successive prosecutions ("attempting a second time to punish criminally").⁹²

The Court's recognition of a distinct multiple-punishments component, however, has not always produced a cogent analysis of whether the defendant's interest in avoiding successive prosecutions or successive punishments is the actual protection at issue in a given case. Indeed, the Court's holdings in the

⁸⁷ See LAFAYE & ISRAEL, *supra* note 3, § 24.1(a).

⁸⁸ See *supra* notes 9-80 and accompanying text.

⁸⁹ But see *United States v. Newby*, 11 F.3d 1143, 1145 (3d Cir. 1993), *cert. denied sub nom. Barber v. United States*, 114 S. Ct. 1841, and *cert. denied*, 115 S. Ct. 111 (1994), for the suggestion that there might be a constitutional difference between the two scenarios. It does not appear, however, that there is a sound basis for treating the two situations differently. The disallowance of criminal punishment because a civil sanction has previously been imposed presents the same constitutional question as its converse. See *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937, 1958 (1994) (Scalia, J., dissenting) ("[I]f there is a constitutional prohibition on multiple punishments, the order of punishment cannot possibly make any difference.").

⁹⁰ *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938).

⁹¹ See *United States v. Halper*, 490 U.S. 435, 442 (1989); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 359-60 (1984); *Rex Trailer Co. v. United States*, 350 U.S. 148, 150-51 (1956); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549 (1943).

⁹² See Jahncke, *supra* note 7, at 133.

line of double jeopardy cases involving parallel proceedings prior to *Halper* did not clearly distinguish between multiple-prosecutions and multiple-punishments analysis. The *Halper* and *Kurth Ranch* decisions differed from their predecessors in this respect. At the outset of both opinions, the Court specifically framed the issue in terms of whether there had been a violation of the constitutional prohibition against successive or multiple punishments for the same offense.⁹³ As discussed previously, the Court's decisions in *Halper*⁹⁴ and *Kurth Ranch*⁹⁵ found a civil fine and a tax assessment, respectively, to be unconstitutional second punishments. The Court invoked the multiple-punishments component as the constitutional basis for both holdings, thereby giving the concept a legitimacy that it had never before enjoyed. The expanded use of the double jeopardy protection, however, raises what one Justice has called "the antecedent question"⁹⁶ of whether a multiple-punishments component is legitimately embodied by the Double Jeopardy Clause.

IV. THE CASE AGAINST THE EXISTENCE OF A MULTIPLE-PUNISHMENTS COMPONENT

A. Legislative History

Despite the fact that the Fifth Amendment has been part of the Constitution since 1791,⁹⁷ there is still uncertainty to this day surrounding the proper scope of the double jeopardy provision. The primary reason for this uncertainty is that historical records relating to the Amendment's adoption are scarce.⁹⁸

What is known is that James Madison submitted a group of proposed constitutional amendments to the United States House of Representatives in June 1789. In their final form, the propositions that were approved became the

⁹³ *Kurth Ranch*, 114 S. Ct. at 1941; *Halper*, 490 U.S. at 440.

⁹⁴ See *supra* text accompanying notes 49-64.

⁹⁵ See *supra* text accompanying notes 65-80.

⁹⁶ *Kurth Ranch*, 114 S. Ct. at 1958 (Scalia, J., dissenting).

⁹⁷ The Fifth Amendment, along with the rest of the Bill of Rights, was ratified on December 15, 1791. Leonard W. Levy, *The Bill of Rights*, in *THE AMERICAN FOUNDING: ESSAYS ON THE FORMATION OF THE CONSTITUTION* 295, 295 (J. Jackson Barlow et al. eds., 1988).

⁹⁸ See SIGLER, *supra* note 83, at 27-34. Sigler observed that "the double jeopardy clause was adopted by the First Congress of the United States without much debate or indication of its intended meaning." *Id.* at 32. See also Donald E. Burton, Note, *A Closer Look at the Supreme Court and the Double Jeopardy Clause*, 49 OHIO ST. L.J. 799, 801-02 (1988).

Bill of Rights.⁹⁹ Included within Madison's proposals was Proposition 4, clause 5, stating that "[n]o person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence."¹⁰⁰ The House sent a version of the amendment to the Senate for approval that was virtually identical to that proposed initially by Madison. In the Senate, however, a proposal was offered stating that no person shall "be twice put in jeopardy of life or limb by any public prosecution."¹⁰¹ Had this been the version that was ultimately ratified, it would have resolved any doubt that the Double Jeopardy Clause was meant to apply only to criminal prosecutions. Unfortunately, the express reference to "public prosecution" was omitted in the final version that was approved by both the House and the Senate.¹⁰²

It is clear, nonetheless, that much of the Senate's language was ultimately adopted into the Fifth Amendment as ratified in 1791. Only Madison's initial draft as proposed in the House used the term "punishment," and the reference to multiple punishments for the same offense is nowhere to be found in the Senate version or the final wording that exists today.

The fact that the language of Madison's initial proposal was altered considerably before the protection was framed in the Fifth Amendment should be significant. The Supreme Court in *Halper*, however, apparently chose to overlook this historical background when it alluded to Madison's initial version of the Double Jeopardy Clause and emphasized that Madison "focused explicitly on the issue of multiple punishment."¹⁰³ The *Halper* Court was seemingly concerned about invoking the legislative history of the Double Jeopardy Clause in an effort to validate the existence of a multiple-punishments component. In holding up Madison's initial proposal as textual evidence of a desire to protect against multiple punishments, the Court inadvertently

⁹⁹ Madison's amendments were grouped into a total of nine proposals. He had attempted to consider all of the amendments proposed by the various state ratifying conventions and combine those which he considered appropriate into a single resolution to be submitted to the Congress. Madison, however, did not intend for the amendments to be attached to the Constitution as an appendage, but rather that they be woven into the body of the Constitution as set out in the proposals. Accordingly, Madison introduced each of his nine proposed amendments by stating the point in the text of the Constitution at which it would be inserted. 1 ANNALS OF CONG. 433-36 (Joseph Gales ed., 1834).

¹⁰⁰ *Id.* at 434.

¹⁰¹ SIGLER, *supra* note 83, at 31.

¹⁰² According to Sigler, "[s]omewhere, beyond the ken of the recording secretaries, the words 'by any public prosecution' were eliminated from the phrase." *Id.* at 32. Thus, the clear directive that the Double Jeopardy Clause applied only to criminal prosecutions was lost forever.

¹⁰³ *United States v. Halper*, 490 U.S. 435, 440 (1989).

highlighted the fact that the Double Jeopardy Clause as ratified contains no such reference to multiple punishments. The constitutional significance of this was lost on the *Halper* Court.

The belief that the Double Jeopardy Clause does not prohibit multiple punishments was endorsed as far back as the *Hess* case. In his concurring opinion in *Hess*, Justice Frankfurter questioned the need for the majority to engage in statutory construction analysis in order to uphold the sanctions imposed under the civil False Claims Act.¹⁰⁴ He wrote:

[W]here two . . . proceedings merely carry out the remedies which Congress has prescribed in advance for a wrong, they do not twice put a man in jeopardy for the same offense. Congress thereby merely allows the comprehensive penalties which it has imposed to be enforced in separate suits instead of in a single proceeding.¹⁰⁵

In an enlightening passage discussing the historical context of the Double Jeopardy Clause, Frankfurter continued:

[L]egislation of this character, providing two sanctions for the same misconduct, enforceable in separate proceedings, one a conventional criminal prosecution, and the other a forfeiture proceeding or a civil action as upon a debt, was quite common when the Fifth Amendment was framed by Congress. Like other specific provisions of the Constitution, the double jeopardy clause must be read in the context of its times. It would do violence to proper regard for the framers of the Fifth Amendment to assume that they contemporaneously enacted and continued to enact legislation that was offensive to the guarantees of the double jeopardy clause which they had proposed for ratification.¹⁰⁶

Thus, the historical background of the Double Jeopardy Clause demonstrates that its drafters intended its protection to extend to successive prosecutions, but there is little, if any, basis to believe that it was ever meant to preclude successive punishments for an offense.

¹⁰⁴ Referring to the Court's reliance on the statutory construction approach to label the sanction as "civil," Frankfurter wrote: "Such dialectical subtleties may serve well enough for purposes of explaining away uncritical language in earlier cases. But they are too subtle when the problem is one of safeguarding the humane interests for the protection of which the double jeopardy clause was written into the Fifth Amendment." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 554 (1943) (Frankfurter, J., concurring) (citations omitted).

¹⁰⁵ *Id.* at 555.

¹⁰⁶ *Id.* at 555-56 (citation omitted).

B. *Ex parte Lange as an Unsound Doctrinal Basis*

The existence of a multiple-punishments component in the Double Jeopardy Clause can be traced back in the Supreme Court's case law to *Ex parte Lange*.¹⁰⁷ When examined closely, however, the use of *Lange* as a doctrinal basis for a multiple-punishments component is of dubious value.¹⁰⁸

In *Lange*, the defendant was convicted of stealing United States mail bags. The federal statute under which *Lange* was convicted authorized either a jail term or a monetary fine. Despite the clear directive of the statute, the judge sentenced *Lange* to one year of imprisonment and a \$200 fine. The Supreme Court issued a writ of habeas corpus due to the fact that the lower court had exceeded statutory authorization in imposing the sentence.¹⁰⁹

In the opinion for the Court, Justice Miller wrote that "[i]f there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence."¹¹⁰ According to the Court, the common law not only forbade a second trial for the same offense, but rather went further by prohibiting a second punishment for the same offense.¹¹¹ In the Court's view, these "salutary principles of the common law"¹¹² were to some extent embodied in the Fifth Amendment's Due Process and Double Jeopardy Clauses.

Therein lies the confusion regarding *Lange*. The Court in *Lange* identified prohibitions against multiple prosecutions and multiple punishments as two accepted principles of the common law. With regard to the former, there is no doubt that it was embodied in the Double Jeopardy Clause. The latter principle concerning multiple punishments, however, was not necessarily incorporated into the same Clause. Even if one accepts that such a protection existed at the common law, this does not mean that the Double Jeopardy Clause was ever meant to address it.

Far from relying exclusively on the concept of double jeopardy, the *Lange* Court also specifically referenced the Due Process Clause.¹¹³ It is important to

¹⁰⁷ 85 U.S. (18 Wall.) 163 (1873).

¹⁰⁸ See *In re Bradley*, 318 U.S. 50, 53 (1943) (Stone, C.J., dissenting) ("So far as *Ex parte Lange* is regarded here as resting on the ground that it would be double jeopardy to compel the offender to serve the prison sentence after remission of the fine on the same day on which it was paid, I think its authority should be reexamined and rejected.").

¹⁰⁹ *Lange*, 85 U.S. (18 Wall.) at 175-78.

¹¹⁰ *Id.* at 168.

¹¹¹ *Id.* at 169.

¹¹² *Id.* at 170.

¹¹³ See *id.* at 170. The Due Process Clause referenced in *Lange* states that "No person shall . . . be deprived of life, liberty, or property, without due process of law" U.S.

bear in mind that the dual sanctions at issue in *Lange* were punishments in excess of that which had been authorized by the legislature. The decision in *Lange* can be justified on due process grounds alone because *Lange* had suffered a deprivation of liberty and property in excess of the penalty authorized by the statute.¹¹⁴ Procedural due process certainly requires that the legislature has authorized by statute whatever criminal sentence is imposed.¹¹⁵

Thus, the decision in *Lange* is not a sound basis upon which to support the existence of a multiple-punishments component in the Double Jeopardy Clause.¹¹⁶ When read in context, *Lange* simply stands for the proposition that it is unconstitutional to impose a second punishment on a criminal defendant when the statute under which the penalty is sought only authorizes one criminal sanction.

C. The Due Process Requirement of Legislative Authorization

The belief that there is a multiple-punishments component subsumed by the Double Jeopardy Clause originated in *Lange*. Since then, the Supreme Court has often categorically stated that the double jeopardy protection extends to both successive prosecutions and successive punishments.¹¹⁷

The previous discussion of *Lange* demonstrated how the confusion could have arisen. The *Lange* Court rested its decision on principles of the common law that to some extent had been embodied in the Fifth Amendment.¹¹⁸ The reference in *Lange* to the Fifth Amendment's double jeopardy language was historically unfortunate because the Amendment's due process provision was clearly a sufficient basis for the Court's decision.¹¹⁹ Despite this, the *Lange* decision simply has come to be accepted over the past century as establishing the constitutional holding that the Double Jeopardy Clause bars a person from

CONST. amend. V.

¹¹⁴ See *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937, 1956 (1994) (Scalia, J., dissenting).

¹¹⁵ *Id.* ("[T]he guarantee of the process provided by the law of the land assures prior legislative authorization for whatever punishment is imposed." (citation omitted)). See generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 13.8, at 526 (4th ed. 1991) (observing that "[w]hen the legislature passes a law which affects a general class of persons, those persons have all received procedural due process—the legislative process.").

¹¹⁶ *Ex Parte Lange* is the only case cited as authority by the *Halper* Court in support of the proposition that a multiple-punishments component "has deep roots in our history and jurisprudence." *United States v. Halper*, 490 U.S. 435, 440 (1989).

¹¹⁷ See *supra* note 86 and accompanying text.

¹¹⁸ *Lange*, 85 U.S. (18 Wall.) at 170.

¹¹⁹ See *supra* note 113 and accompanying text.

being twice punished for the same offense.¹²⁰

Moreover, the multiple punishments prohibited in *Lange* were in excess of what was authorized by the relevant statute. This specific prohibition against multiple punishments that are not legislatively authorized somehow became construed to be a general prohibition against successive punishments of any kind.

In his dissenting opinion in *Kurth Ranch*,¹²¹ Justice Scalia discussed the transformation of the prohibition against multiple punishments.¹²² He wrote:

[A]n examination of the cases discussing the prohibition against multiple punishments demonstrates that, until *Halper*, the Court never invalidated a *legislatively authorized* successive punishment. The dispositions were entirely consistent with the proposition that the restriction derived exclusively from the due-process requirement of legislative authorization.¹²³

To Scalia, it is preferable to view the rule against double punishments as “an aspect of the Due Process Clause requirement of legislative authorization”¹²⁴ rather than as “a free-standing constitutional prohibition implicit in the Double Jeopardy Clause.”¹²⁵ Doing so, of course, clarifies the nature of the prohibition against multiple punishments.

Although the Supreme Court had never invalidated a legislatively authorized second punishment before *Halper*, its decisions in the line of cases from *Mitchell* to *One Assortment of 89 Firearms* nonetheless suggest that the Court was viewing the prohibition against successive punishments too expansively. The Court, referring to the oft-quoted language of *Mitchell*, repeatedly held that “the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally for the same offense.”¹²⁶ The Court repeated this general proposition so often that it

¹²⁰ See, e.g., *United States v. Halper*, 490 U.S. 435, 440 (1989) (citing *Lange* in support of the proposition that the Double Jeopardy Clause prohibits multiple punishments).

¹²¹ Justice Thomas joined Justice Scalia’s dissent. *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937, 1955 (1994) (Scalia, J., dissenting).

¹²² *Id.* at 1956–59. Interestingly, Justice Scalia joined the Court’s unanimous opinion in *Halper*. By the time *Kurth Ranch* was decided by the Court in 1994, Justice Scalia had come to the conviction that *Halper* was in error. In his words, “[t]he difficulty of applying *Halper*’s analysis to Montana’s Dangerous Drug Tax has prompted me to focus on the antecedent question whether there is a multiple-punishments component of the Double Jeopardy Clause.” *Id.* at 1958. He concluded that there is not. *Id.*

¹²³ *Id.* at 1956.

¹²⁴ *Id.* at 1957.

¹²⁵ *Id.*

¹²⁶ *United States v. Halper*, 490 U.S. 435, 442 (1989) (quoting *Helvering v. Mitchell*,

changed the very nature of the prohibition. Instead of simply requiring legislative authorization, the rule against double punishments had assumed a much broader reach.

The recognition of a multiple-punishments component in the Double Jeopardy Clause by the Court did not produce a harmful result until the decision in *Halper*.¹²⁷ As Justice Scalia pointed out in *Kurth Ranch*, even if the rule against multiple punishments was held to be implicit in the Double Jeopardy Clause, that Clause's "ban on successive criminal prosecutions would make surplusage of any distinct protection against additional punishment imposed in a *successive prosecution*, since the prosecution *itself* would be barred."¹²⁸ In *Halper*, however, the Court not only extended the rule against multiple punishments to civil sanctions, it simultaneously affirmed that the rule required more than adherence to legislative authorization.¹²⁹ The *Halper* Court bestowed on the rule, in Justice Scalia's words, "a breadth of effect it never before enjoyed."¹³⁰

The *Halper* and *Kurth Ranch* decisions are a direct result of the expansive reading of the Double Jeopardy Clause that originated with the Court's unfortunate reference to the Clause in *Lange*. The Double Jeopardy Clause bars multiplicity only in the sense that it prohibits successive criminal prosecutions.

303 U.S. 391, 399 (1938)); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 359-60 (1984) (quotation omitted); *Rex Trailer Co. v. United States*, 350 U.S. 148, 150-51 (1956) (quotation omitted); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549 (1943) (quotation omitted); see also *supra* note 91 and accompanying text.

¹²⁷ The same decision could have been reached in *Halper* under a more sound constitutional basis. The Eighth Amendment provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Excessive Fines Clause could be applied to civil fines, thereby alleviating the need to invoke the suspect idea of a multiple-punishments component within the Double Jeopardy Clause. See *Kurth Ranch*, 114 S. Ct. at 1958 n.2 (Scalia, J., dissenting) ("The Excessive Fines Clause . . . may well support the judgment in *Halper*.") (citations omitted); Jahncke, *supra* note 7, at 142-47 (discussing the applicability of the Eighth Amendment's Excessive Fines Clause to disproportionate civil fines).

Indeed, the Supreme Court has very recently been active in the area of excessive fines jurisprudence. See *Alexander v. United States*, 113 S. Ct. 2766, 2775-76 (1993) (applying the Excessive Fines Clause for the first time to in personam criminal proceedings); *Austin v. United States*, 113 S. Ct. 2801, 2803 (1993) (holding that the Excessive Fines Clause applies to forfeitures of property). These cases lend support to the belief that the Excessive Fines Clause would be an appropriate constitutional framework for addressing the proportionality of civil fines. Such an approach would avoid the problems inherent in a double jeopardy analysis premised upon a prohibition against multiple punishments.

¹²⁸ *Kurth Ranch*, 114 S. Ct. at 1957 (Scalia, J., dissenting) (footnote omitted).

¹²⁹ *Id.*

¹³⁰ *Id.*

It does not speak to the constitutionality of imposing more than one punishment on a person for the same offense.¹³¹

V. REVISITING *HALPER* AND *KURTH RANCH*

A. *The Court's Decision in Halper*

The foregoing analysis has attempted to show that the multiple-punishments component of the Double Jeopardy Clause does not exist.¹³² By its terms, the Clause prohibits not successive punishments, but rather successive prosecutions. Thus, a civil proceeding subsequent to a criminal prosecution is not prohibited even if the civil proceeding results in some type of punishment being levied against the defendant.¹³³ The conviction that there is no "punishment" component within the Double Jeopardy Clause leads to the conclusion that the Court was in error in both *Halper* and *Kurth Ranch*.

The Court in *Halper* specifically held that of the three distinct abuses protected against by the Double Jeopardy Clause, the "one at issue" was the multiple-punishments component.¹³⁴ While avowedly finding the civil sanction to be an unconstitutional second punishment, the *Halper* Court revealed its true concern to be more consistent with a violation of the bar against successive prosecutions:

That the government seeks the civil penalty in a second proceeding is critical in triggering the protections of the Double Jeopardy Clause. Since a

¹³¹ See *The Supreme Court, 1993 Term — Leading Cases*, *supra* note 80, at 177 n.50 (observing that "despite much rhetoric, no Supreme Court decision has suggested any doctrinal basis for extending double jeopardy protection to legislatively authorized multiple punishments").

¹³² See *supra* part IV.A-C.

¹³³ In *Halper*, the Court observed that the "notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads." *United States v. Halper*, 490 U.S. 435, 448 (1989) (citation omitted). The observation that punitive ends may be pursued in civil proceedings is all too obvious. Punishment can take many forms, and an individual who has suffered a civil penalty may be deemed to have been "punished" in some sense of the word. The conclusion that civil sanctions can carry the sting of punishment, however, does not change the fact that punishment under a civil statute should not trigger double jeopardy protection. The Double Jeopardy Clause only requires that there be no successive criminal prosecutions. It was never meant to require a judicial inquiry into the punitiveness of a given sanction.

¹³⁴ *Id.* at 440.

legislature may authorize cumulative punishment under two statutes for a single course of conduct, the multiple-punishment inquiry in the context of a single proceeding focuses on whether the legislature actually authorized the cumulative punishment. On the other hand, when the Government already has imposed a criminal penalty and seeks to impose additional punishment in a second proceeding, the Double Jeopardy Clause protects against the possibility that the Government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding.¹³⁵

The Court made clear that nothing would preclude "the Government from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding."¹³⁶ In such a proceeding, the issue of multiple punishments would be limited to ensuring that the cumulative punishment imposed on someone like Halper did not exceed that authorized by the legislature.¹³⁷

Thus, the *Halper* Court ostensibly found a multiple-punishments violation, but in reality the Court was most concerned with the fact that the defendant had been subjected to two judicial proceedings. The Court obviously wanted to extend the reach of the double jeopardy guarantee to protect what it viewed as a "small-gauge offender"¹³⁸ who was facing an "overwhelmingly disproportionate"¹³⁹ sanction. Knowing that its decision could not be attributed to the successive-prosecutions component of the Double Jeopardy Clause, the Court instead turned to the historically unsubstantiated idea of a multiple-punishments component. In essence, the never-before-utilized notion of a multiple-punishments component provided exactly what the Court needed to disallow a legislatively authorized civil sanction because criminal punishment had already been imposed on the defendant.

B. *The Decision in Kurth Ranch*

The Court in *Kurth Ranch* also ostensibly struck down the application of Montana's drug tax because it was a second punishment within the contemplation of the constitutional protection afforded by the Double Jeopardy Clause.¹⁴⁰ In fact, the focus of the majority opinion in *Kurth Ranch* was specifically on how Montana's marijuana tax could be characterized as

¹³⁵ *Id.* at 451 n.10 (citation omitted).

¹³⁶ *Id.* at 450.

¹³⁷ *Id.* (citing *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983)).

¹³⁸ *Id.* at 449.

¹³⁹ *Id.*

¹⁴⁰ See *supra* notes 72-80 and accompanying text.

punishment.¹⁴¹

Again, though, the Court's language clearly indicates that it was concerned not about cumulative punishments per se, but rather the imposition of such punishments in separate proceedings: "Montana no doubt could collect its tax on the possession of marijuana, for example, if it had not previously punished the taxpayer for the same offense, or, indeed, if it had assessed the tax in the same proceeding that resulted in his conviction."¹⁴² The Court was repeating a distinction that it first made in *Halper*.¹⁴³ The distinction drawn by the Court is that when a defendant faces parallel criminal and civil¹⁴⁴ sanctions for a single course of conduct, such legislatively authorized punishments are permissible if imposed in one proceeding, but are unconstitutional if imposed in successive proceedings. This distinction is apparently premised on the Double Jeopardy Clause's prohibition of multiple prosecutions; however, a civil¹⁴⁵ proceeding is not a "jeopardy" for purposes of the Clause.¹⁴⁶ Hence, the textual basis for the distinction is lacking. This flaw in the Court's reasoning in both *Halper* and *Kurth Ranch* demonstrates the need for re-examining the very existence of a multiple-punishments component.¹⁴⁷

The decision in *Kurth Ranch* was supposed to have been based on the finding of a violation of "the constitutional prohibition against successive punishments for the same offense."¹⁴⁸ If this really is an analytically distinct component of the Double Jeopardy Clause, the Court should have had little difficulty in distinguishing it from the successive-prosecutions doctrine. Nevertheless, after finding the drug tax to be a second punishment, the Court in *Kurth Ranch* added that the "proceeding Montana instituted to collect a tax on the possession of drugs was the functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy a second time 'for the same offence.'"¹⁴⁹ This invocation of the successive-prosecutions doctrine only

¹⁴¹ *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937, 1945-48 (1994).

¹⁴² *Id.* at 1945.

¹⁴³ See *supra* notes 135-37 and accompanying text.

¹⁴⁴ The more precise term might be "noncriminal" sanction. A statute imposing a tax on unlawful conduct is not a civil sanction because, as the majority recognized in *Kurth Ranch*, "tax statutes serve a purpose quite different from civil penalties" *Kurth Ranch*, 114 S. Ct. at 1948.

¹⁴⁵ Again, the better term might be "noncriminal" proceeding. See *supra* note 144. A non-criminal proceeding would encompass a tax action such as in *Kurth Ranch*.

¹⁴⁶ *Kurth Ranch*, 114 S. Ct. at 1957 n.1 (Scalia, J., dissenting).

¹⁴⁷ See *The Supreme Court, 1993 Term—Leading Cases*, *supra* note 80, at 181 (urging the Supreme Court to take the opportunity to address directly whether there is any independent basis for the multiple-punishments prong of the Double Jeopardy Clause).

¹⁴⁸ *Id.* at 1941.

¹⁴⁹ *Id.* at 1948 (quoting U.S. CONST. amend. V.)

undermines the integrity of the Court's decision, and it serves to reinforce the view that there really is no true multiple-punishments component.¹⁵⁰ *Kurth Ranch*, like *Halper* before it, demonstrates that the bar against multiple punishments is simply a convenient fiction for extending double jeopardy protection to a noncriminal proceeding that would not otherwise fall within the ambit of the Clause's actual prohibition of multiple prosecutions.

VI. CONCLUSION

The Double Jeopardy Clause prohibits successive prosecutions, not successive punishments. It is unfortunate that the Supreme Court based its decisions in *Halper* and *Kurth Ranch* on the unsound idea of a Fifth Amendment prohibition of multiple punishments. The multiple-punishments component is a fictional judicial creation that, once invoked, allows courts to ignore legislative decisions concerning the proper level of punishment for an offense. The Double Jeopardy Clause simply requires that there be no multiplicity of criminal prosecutions for the same criminal offense. Thus, in the context of parallel criminal and civil proceedings, the Double Jeopardy Clause should not function as a bar to the enforcement of any civil penalty validly authorized by a legislature.

¹⁵⁰ If the Supreme Court viewed the tax proceeding itself as criminal, then Montana's application of the Dangerous Drug Tax Act would have run afoul of the Double Jeopardy Clause's actual prohibition of multiple prosecutions and not any distinct multiple-punishments component. See *supra* note 128 and accompanying text. As Justice Scalia so aptly observed, "[t]o be put in jeopardy' does not remotely mean 'to be punished,' so by its terms this provision prohibits, not multiple punishments, but only multiple prosecutions." *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937, 1955 (1994) (Scalia, J., dissenting).

